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ABSTRACT

Presented in this paper is a discussion of various federal demands and their ramifications concerning nondiscriminatory employment practices in higher education. These demands require that colleges and universities desiring or holding federal contracts eliminate all traces of discriminatory practices with regard to faculty recruitment, hiring, anti-nepotism policies, placement, job classification and assignment, promotion, termination, conditions of work, salary rights and benefits, leave policies and fringe benefits. A complaint of discrimination may be filed by or on behalf of an individual or by one of the Commissioners of the Equal Employment Opportunity Commission (EEOC). Notice of the charge is forwarded to the employer within 10 days stating the date, place and circumstances of the alleged unfair employment practice. After an investigation, if a finding of discrimination is confirmed and the employer and complainant have failed to reach conciliation, the individual or the Commission may file suit. If a court finds that an employer has intentionally engaged in an unlawful employment practice, it has the authority to enjoin the respondent from such practices, order affirmative action that may be necessary, and any other equitable relief that it may deem appropriate. (HS)

EQUAL EMPLOYMENT OPPORTUNITY

~~REGULATORY~~ PRESSURES ON COLLEGES AND UNIVERSITIES--PRESENT & PENDING

by

Sheldon Elliot Steinbach

REGULATORY PRESSURES ON COLLEGES AND UNIVERSITIES--PRESENT & PENDING

Over the past several years, college and university administrators have witnessed an increasing amount of Federal regulation of activities that were previously managed at the sole discretion of the institution. Legislative and Executive actions taken this past year give every indication that this trend toward increasing government supervision of various college and university functions will continue and probably expand in the years ahead. The growth in external regulation can be viewed to its fullest extent in the various laws and regulations pertaining to race and sex discrimination that now have a direct impact on every campus in this country.

The primary concern of college and university administrators in the past two years has focused on Executive Order 11246, issued in September, 1965, which prohibits discrimination because of race, creed, color, or national origin by federal contractors and subcontractors. Executive Order 11375 amended 11246 effective October, 1968 to include a prohibition against discrimination on account of sex.

Under the Executive Order and the implementing regulations of the Department of Labor, every institution which holds a federal contract or subcontract of $10,000 or more must agree not to discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. Every private institution which employs more than 50 persons and which holds federal contracts or subcontracts totalling $50,000 must also have on file with HEW a written affirmative action program for each of its establishments.

Although public institutions were not required to actually submit a written program, regulations have been published in proposed form which would require that public institutions perform the same self-analysis and submit the same kind of affirmative action plan required of non-public institutions.

For over two years, institutions in almost every section of the country reported inconsistent actions by regional officers of HEW. Regional officers often made demands on institutions that were not sanctioned by headquarters in Washington. Furthermore, agreements negotiated between regional officers and institutions in one geographic area were found to be unacceptable in other regions. HEW officers acknowledged a certain lack of uniformity in conducting compliance reviews. They anticipate that as the program matures, greater consistency in rulings will emerge from the various regions; however, they have confirmed the need for centralizing the process.

A major concern of campus administrators focused on the lack of procedural due process in HEW's conduct of contract compliance reviews. Administrators noted the following set of problems as being the most crucial. Critical to the establishment of basic due process of law is the restoration of the presumption that institutions are deemed innocent until proven guilty. Administrators stated that the attitude demonstrated by HEW was that all colleges and universities are guilty of discrimination against women.

If an individual complaint is found to be valid or if a contract compliance review uncovers a violation of the Executive Order and the regulations issued pursuant thereto, it would seem to be a basic element of due process of law that the accused party be granted a fair and full hearing before any sanctions are assessed. In fact, colleges and universities

were not afforded any hearing whatsoever prior to the withholding of contracts.

Before any new federal contract in excess of one million dollars can be awarded by an agency to a college or university, the designated compliance agency (in this case HEW) must certify that the prospective contractor is in compliance with the Executive Order. Based on either individual complaints or information gathered during a compliance review, HEW denied such certification to several institutions without according them a hearing, thereby effectively barring them from receipt of the contract. HEW regulations provide that "no order for cancellation . . . termination . . . or for debarment from further contracts or subcontracts . . . shall be made without an opportunity for a hearing." No mention was made in the Executive Order of the sanction of withholding a new contract fully negotiated but not actually awarded.

In the context of contract compliance reviews, the right of appeal embraces two distinct aspects. Administrators were primarily concerned about the lack of an established appeal process for decisions rendered by the regional office. Additionally, it was anticipated that if an institution is involved in a formal hearing process on a charge of non-compliance instituted by HEW, any determination by a hearing officer would be appealable.

Two major issues have emerged as the main substantive concerns of college and university administrators. Although different problems affected individual campuses across the country, access to personnel files and the implementation of goals and timetables for faculty occupied the center of attention at the majority of schools that have undergone extensive contract compliance reviews.

(a) Access to personnel files - Institutions raised the question whether or not HEW has the right to inspect all personnel files which it deems pertinent to a contract compliance review.

HEW maintained that its power to inspect university records is derived from the "equal opportunity clause" of Executive Order No. 11246, as amended, which is embodied in all university contracts with the Federal government. Substantive regulations permit access to "books, records and accounts pertinent to compliance" during "normal business hours" for "purposes of investigation to ascertain compliance with the equal opportunity clause of the contract . . . ." Pursuant to the foregoing regulations, HEW has contended that it has the right to review all matters in personnel files relating to employment and the power to determine what material is germane to their interest.

Institutions contend that there are countervailing personal privileges and rights, including those of constitutional dimension, that compel a limitation of HEW's right of inquiry. A relationship of trust and confidence, which is essential to the operation of a university, may be jeopardized and perhaps destroyed by the improper disclosure of personnel records. Specifically, it is argued that in order to select and promote faculty, it is imperative to obtain candid appraisals, by individuals within and without the institution, of the qualifications of candidates without inducing fear in the recommender that his confidence might be breached. In view of the institution's particular jealousy of the right of its members to speak freely, the maintenance of confidentiality of personnel files also becomes inextricably interwoven with the very maintenance of academic freedom. Moreover, administrators contend that surrender of personnel files to HEW in the absence of a persuasive showing of cause would constitute a serious invasion of the right of privacy of the faculty member involved.

(b) Goals and timetables for faculty - The Executive Order and the regulations issued pursuant thereto mandate that all federal contractors who fall within the jurisdictional requirement must include in their contracts specific provisions respecting fair employment practices and shall have an affirmative action plan which will include goals and timetables for rectifying underutilization of minorities and women.

A court test of the Executive Order which was denied review by the Supreme Court has established, for the time being, the validity of the Order and the concept of goals and timetables. The plaintiffs in Contractors Association of Eastern Pennsylvania v. Secretary of Labor initially agrued that the "Philadelphia Plan" (which required bidders on Philadelphia area federal construction contracts in excess of $500,000 to submit acceptable affirmative action plans which included specific goals for the utilization of minority manpower in six skilled crafts) is social legislation enacted without statutory or constitutional authority. After tracing the history of Executive Orders in the field of fair employment practices, the Court found that the President acted pursuant to an implied authorization of Congress and that "his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."

The contractors, like many college administrators, contended that the Executive Order is proscribed by the limitations contained in Title VII of the Civil Rights Act. The Court found that the limitation contained in Title VII solely pertains to remedies under that title and does not place any restriction on other state or federal remedies.

Lastly, the plaintiffs urged that the goals specified by the plan are racial quotas prohibited by the equal protection clause of the Fifth Amendment. The Court with little discussion found that the Philadelphia

Plan is a valid exercise of Executive power designed to remedy the evil that minority tradesmen have been underutilized on construction projects in which the government has a cost and performance interest. Such action was held not to be violative of the Fifth Amendment.

In an effort to deal with the problems noted above, the higher education community urged HEW to issue guidelines which would serve as a notice and guide to university administrators, as well as ensuring uniformity of action by HEW regional officers.

The Department of Health, Education, and Welfare on October 4 issued guidelines to higher education institutions for complying with an executive order barring discrimination in employment on grounds of race, color, religion, national origin, or sex.

The guidelines deal in particular with affirmative action plans which are required as evidence of nondiscrimination. These plans are defined in the guidelines as follows:

"Affirmative action requires the contractor to do more than ensure employment neutrality with regard to race, color, religion, sex, and national origin. As the phrase implies, affirmative action requires the employer to make additional efforts to recruit, employ and promote qualified members of groups formerly excluded, even if that exclusion cannot be traced to particular discriminatory actions on the part of the employer. The premise of the affirmative action concept of the executive order is that unless positive action is undertaken to overcome the effects of systematic institutional forms of exclusion and discrimination, a benign neutrality in employment practices will tend to perpetuate the status quo ante indefinitely."

The guidelines require goals and timetables for achieving non-discrimination as part of affirmative action plans, but state that rigid quotas are neither required nor permitted. The guidelines define goals as "projected levels of achievement resulting from an analysis by the contractor of its deficiencies, and of what it can reasonably do to remedy them, given the availability of qualified minorities and women and the expected turnover in its work force."

The guidelines further state that "the affirmative action concept does require, however, that any standards or criteria which have had the effect of excluding women and minorities be eliminated, unless the contractor can demonstrate that such criteria are conditions of successful performance in the particular position involved."

Following are excerpted highlights of the section of the guidelines dealing with personnel policies and practices, originally presented in Higher Education and National Affairs.

General - An employer must establish in reasonable detail and make available upon request the standards and procedures which govern all employment practices in the operation of each organizational unit, including any tests in use and the criteria by which qualifications for appointment, retention or promotion are judged.

Recruitment - In both academic and nonacademic areas, universities must recruit women and minority persons as actively as they have recruited white males.

Hiring - Once a nondiscriminatory applicant pool has been established through recruitment, the process of selection from that pool must also carefully follow procedures designed to ensure nondiscrimination. In all cases, standards and criteria for employment should be made reasonably explicit, and should be accessible to all employees and applicants.

Anti-nepotism Policies - Policies or practices which prohibit or limit the simultaneous employment of two members of the same family and which have an adverse impact upon one sex or the other are in violation of the Executive Order.

Placement, Job Classification, and Assignment - Where there are no valid or substantial differences in duties or qualifications between different job classifications, and where persons in the classifications are segregated by race, color, religion, sex, or national origin, those separate classifications must be eliminated or merged.

Promotion - A contractor's policies and practices on promotion should be made reasonably explicit, and administered to ensure that women and minorities are not at a disadvantage.

Termination - Where action to terminate has a disproportionate effect upon women or minorities and the employer is unable to demonstrate reasons for the decision to terminate unrelated to race, religion, color, national origin or sex, such actions are discriminatory.

Conditions of Work - A university employer must ensure nondiscrimination in all terms and conditions of employment, including work assignments, educational and training opportunities, research opportunities, use of facilities, and opportunities to serve on committees or decision-making bodies.

Rights and Benefits--Salary - The Executive Order requires that universities adhere carefully to the concept of equal pay for equal work . . . . Evidence of discrimination that would require back pay as a remedy will be referred to the appropriate Federal enforcement agency if the Office for Civil Rights is not able to negotiate a voluntary settlement with a university.

Leave Policies - A university contractor must not discriminate against employees in its leave policies, including paid and unpaid leave for educational or professional purposes, sick leave, annual leave, temporary disability, and leave for purposes of personal necessity . . . . Pregnancy and childbearing must be considered as a justification of a leave of absence for a female employee regardless of marital status, for a reasonable length of time, and for reinstatement following childbirth without loss of seniority or accrued benefits.

Fringe Benefits - The university should carefully examine its fringe benefit programs for possible discriminatory effects. For example, it is unlawful for an employer to establish a retirement or pension plan which establishes different optional or mandatory retirement ages for men and for women.

The Office for Civil Rights said it will refer individual complaints of discrimination to the Equal Employment Opportunity Commission which, under a 1972 law, has authority to investigate individual complaints of discrimination against academic as well as nonacademic employees of higher education institutions. The OCR will continue to investigate class complaints, groups of individual complaints or other information "which indicates possible institutional patterns of discrimination."

The Equal Employment Opportunity Commission (EEOC) was established in 1965 with a mandate to eliminate job discrimination based on race, color, religion, sex or national origin. Title VII of the Civil Rights Act of 1964, which created the EEOC, exempted faculty and administrators. In March, 1972, the President signed the Equal Employment Opportunity Act of 1972, which expanded the jurisdiction of the Commission to include an estimated four million employees of educational institutions.

Without going into the complaint process in detail, it should be noted that a complaint of discrimination may be filed by or on behalf of an individual or by one of the Commissioners of the EEOC. Notice of the charge is forwarded to the employer within ten days stating the date, place and circumstances of the alleged unfair employment practice. After an investigation, if a finding of discrimination is confirmed and the employer and complainant have failed to reach conciliation, the individual or the Commission may file suit. Although the EEOC may file suit against a private institution, only the U.S. Attorney General may bring suit against a state university.

The Commission has stated that in some limited instances, a job may be limited to one sex provided the employer can prove that sex is a "bona fide occupational qualification." The Commission has construed BFOQ's narrowly. Jobs may be restricted to members of one sex on the following grounds:

(a) authenticity, such as a position as actress or model; and

(b) community standards of morality dictate such action; e.g. lingeree sales clerk or restroom attendant.

Employment may <u>not</u>, however, be restricted on the basis of sex for any of the following reasons:

(a) assumptions related to the applicant's sex, e.g. the assumption that the turnover rate among women is higher than among men;

(b) preferences of co-workers, employers, clients or customers;

(c) the task has traditionally been restricted to members of the opposite sex;

(d) the job involves heavy physical labor, manual dexterity, late or night hours, work in isolated locations or unpleasant surroundings;

(e) physical facilities are not available for both sexes;

(f) the job requires personal characteristics not exclusive to either sex such as tact, charm, or aggressiveness; and

(g) the effect of sex-oriented state employment legislation.

A set of regulations published in the Federal Register on April 5, 1972 banned sex discrimination emanating from separate lines of progression and seniority systems, marital status, help-wanted advertising, employment agency actions, pre-employment inquiries, fringe benefits, and employment policies relating to pregnancy and childbirth.

Where an alleged discriminatory act takes place in a state or locality that has no comparable equal employment opportunity law, a charge must be filed with the EEOC within 180 days after the act occurred. However, the EEOC is required to defer to a state or local agency when such a state or local law exists. Where a state or local agency has priority, a charge must be filed with the EEOC no later than 300 days after the alleged discriminatory act or 30 days after the aggrieved person has received notice of the termination of state or local proceedings, whichever is earlier. When a charge is filed with the EEOC prior to the commencement of state or local proceedings, the EEOC gives notice of the charge to the appropriate state or local agency and can take no action with respect to the charge until the state or local agency has had the case for 60 days, unless state or local proceedings are terminated earlier.

If a court finds that an employer has intentionally engaged in an unlawful employment practice, it has the authority to enjoin the respondent from such practices, order affirmative action that may be necessary, and any other equitable relief that it may deem appropriate. In addition, a court is authorized to award back pay, except that back

pay liability is limited to that which accrues from a date not more than two years prior to the filing of charges with the Commission. Any interim earnings will be deducted from any back pay awarded.

Due to limited funds and personnel, the EEOC has primarily used its new powers on a selective basis. Since their appropriations request for the coming year was substantially reduced by Congress, it would seem that the backlog of complaint investigations will not be diminished and that complaints issued to colleges and universities will be processed slowly. It is not unlikely, however, that in order to awaken the college and university community to their presence, EEOC might pick one well-known institution and deal with the complaint immediately.

An unknown quantity is presented by Title IX of the Higher Education Amendments of 1972. Most of the concentration of college and university officials focused on the question of discrimination in admissions. Under the Act, no public institution may discriminate in admissions except one that has traditionally been a single-sex institution. Also exempted from the admission provision are (a) private undergraduate institutions of higher education, and (b) schools in transition from single-sex to coeducational. Title IX further provides that "no person in the U.S. shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving financial assistance . . . ." Regulations are presently being drafted by HEW that will cover topics such as dormitory housing, fraternities and sororities, financial aid, student health insurance, allocation of athletic facilities and budget, and numerous other college and university activities and services that now must not discriminate against women. It is our present understanding that the proposed regulations will be published in the Federal Register, thereby giving the higher education community an opportunity to comment before their final implementation.

Another piece of relatively new legislation which warrants some consideration is the expansion of coverage of the Equal Pay Act. The Act was amended this year to extend coverage to executive, administrative and professional employees, and basically provides that individuals in the same place of employment who perform substantially similar tasks must receive the same pay. The legislation, which is administered by the Wage and Hour division of the Department of Labor, does not have a formal complaint procedure, but simply requires that the aggrieved individual contact the nearest office of the Wage and Hour division. Wage differentials based on a bona fide seniority or merit system can be lawfully maintained, as well as any other classification system based on quality or quantity of production. After an investigation, if a violation has been found, the employer is requested by the Department of Labor to equalize the pay of the aggrieved individual and possibly make restitution in the form of back pay, which is limited to two years for non-willful and three years for willful violations. If the employer refuses to comply, the complainant or the Department of Labor may bring suit.

In the years ahead, colleges and universities will encounter increasing regulation of various activities and functions that were previously governed by the institution itself. The expansion of federal regulation does not in every instance embrace higher education as a specific institution in society. The extension of coverage for the most part is the result of a growing national concern about a given subject that is given effect through federal legislation. It is imperative that the college and university community be vigilant with regard to existing and future federal regulations so as to ensure that the regulatory system established is administered in an even-handed manner and is compatible with the unique aspects of higher education. At the same time, it would seem not to be in the best interest of higher education to consistently resist or seek delays in implementation of federal laws that are geared toward protecting individuals from existing abuses. Especially in the area of employment, institutions should not wait for federal intervention in order to put their personnel policies in order, but should on their own initiative take positive steps to establish fair personnel policies. The experience gained in dealing with federal regulations relating to equal employment opportunity should serve as a lesson to institutions of higher education that will hopefully lead them to maintain equitable policies with regard to employees, students and the neighboring community.